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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 GARY U.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL
14 SECURITY,

15 Defendant.

CASE NO. 3:19-CV-5364-DWC

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

16 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of
17 Defendant's denial of Plaintiff's application for disability insurance benefits ("DIB"). Pursuant
18 to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties
19 have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 4.

20 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")
21 erred by not providing persuasive, specific, valid reasons for discounting a 100 percent disability
22 rating from the Veteran's Administration ("VA"). Had the ALJ properly considered this
23 evidence, the RFC may have contained additional limitations.
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ORDER REVERSING AND REMANDING
DEFENDANT'S DECISION TO DENY BENEFITS

1 Accordingly, this matter is reversed and remanded pursuant to sentence four of 42 U.S.C.
2 § 405(g) to the Social Security Commissioner (“Commissioner”) for further proceedings
3 consistent with this Order.

4 FACTUAL AND PROCEDURAL HISTORY

5 This case has a lengthy procedural history. On July 27, 2010, Plaintiff filed an application
6 for disability insurance benefits, alleging a disability onset date of December 31, 2002. AR 21,
7 124-30, 911. Plaintiff subsequently amended his alleged onset date to August 1, 2003. AR 905.
8 His application was denied upon initial administrative review and on reconsideration. AR 21, 55-
9 57, 64-68, 911. A hearing was held before ALJ Verrell Dethloff on November 16, 2011. AR 38-
10 52, 1040-54. In a decision dated January 30, 2012, ALJ Dethloff found that Plaintiff was not
11 disabled. AR 18-33, 908-23. The Social Security Appeals Council denied Plaintiff’s request for
12 review on August 1, 2013. AR 1-5, 928-32.

13 Plaintiff filed a complaint in this Court seeking judicial review of the ALJ’s written
14 decision on October 4, 2013. AR 947. This Court issued an order affirming the ALJ’s decision to
15 deny benefits on June 24, 2014. AR 951-72. Plaintiff appealed the Court’s ruling to the United
16 States Court of Appeals for the Ninth Circuit on August 26, 2014. AR 935.

17 On March 24, 2017, the Court of Appeals issued an order reversing and remanding the
18 ALJ’s decision for reconsideration of a disability rating from the VA and the results of an
19 examination conducted by Ezatolah Rezvani, M.D. AR 939-45. On October 26, 2017, the
20 Appeals Council issued an order vacating the ALJ’s decision and remanding the case for further
21 proceedings. AR 973-76.

22 On January 2, 2019, ALJ M.J. Adams held a new hearing. AR 873-907. In a decision
23 dated January 2, 2019, ALJ Adams found that Plaintiff was not disabled. AR 852-66. Plaintiff
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1 filed a complaint in this Court seeking judicial review of the ALJ's written decision on May 2,
2 2019. Dkt. 1.

3 In Plaintiff's Opening Brief, Plaintiff maintains the ALJ erred by: (1) failing to account
4 for the functional impact of Plaintiff's impairments at step two; (2) failing to properly assess an
5 examination conducted by Ezatolah Rezvani, M.D.; (3) failing to properly assess opinion
6 evidence from nurse practitioners Dana Tell, ARNP and Betty Bennett, ARNP; (4) assigning
7 significant weight to the opinion of Mark Suffis, M.D.; (5) improperly evaluating a disability
8 rating decision from the VA; and (6) failing to properly evaluate Plaintiff's symptom testimony.
9 Dkt. 12, pp. 3-16.

10 STANDARD OF REVIEW

11 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
12 social security benefits if the ALJ's findings are based on legal error or not supported by
13 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
14 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

15 **I. Whether Plaintiff's arguments are precluded by law of the case** 16 **considerations.**

17 As a preliminary matter, Defendant asserts that several of Plaintiff's arguments are
18 precluded by the law of the case doctrine. Dkt. 13, pp. 3, 6-8, 10-11.

19 The law of the case doctrine generally prohibits a court from considering an issue that has
20 already been decided by that same court or a higher court in the same case. *Stacy v. Colvin*, 825
21 F.3d 563, 567 (9th Cir. 2016) (citations omitted). The law of the case doctrine "is concerned
22 primarily with efficiency, and should not be applied when the evidence on remand is
23 substantially different, when the controlling law has changed, or when applying the doctrine
24 would be unjust." *Id.*

1 In its 2017 remand order, the Ninth Circuit found that ALJ Dethloff did not provide valid
2 reasons for discounting the VA's disability determination and erred by not considering Dr.
3 Rezvani's evaluation. AR 941-43. The Ninth Circuit found that Plaintiff's arguments concerning
4 other errors in ALJ Dethloff's decision were unpersuasive. AR 942. The Ninth Circuit found that
5 even crediting as true Dr. Rezvani's evaluation and the VA's disability rating, the ALJ would not
6 be required to find Plaintiff disabled, and remanded the case to the agency on an open record for
7 further proceedings. *See* AR 942-43, citing *Burrell v. Colvin*, 775 F.3d 1133, 1141-42 (9th Cir.
8 2014).

9 Plaintiff contends that the Ninth Circuit only provided a general statement that Plaintiff's
10 remaining arguments were unpersuasive, and did not explain its reasoning for rejecting
11 Plaintiff's other arguments. Dkt. 14, p. 3.

12 The Ninth Circuit was clear that it found error in ALJ Dethloff's evaluation of Dr.
13 Rezvani's evaluation and the disability rating from the VA, but that Plaintiff's allegations
14 concerning other errors in the ALJ's decision were unpersuasive. The fact that the Ninth Circuit
15 did not provide a more detailed explanation for discounting Plaintiff's other contentions does not
16 prevent this Court from applying the law of the case doctrine with respect to the Ninth Circuit's
17 evaluation of ALJ Dethloff's 2012 hearing decision.

18 However, the application of the law of the case doctrine does not necessarily preclude
19 this Court from considering errors in ALJ Adams' 2019 hearing decision if the decision contains
20 errors not present in ALJ Dethloff's earlier decision.

21 The Court notes that ALJ Adams adopted many of ALJ Dethloff's findings, reasoning
22 that this Court affirmed ALJ Dethloff's assessment of Plaintiff's non-severe impairments,
23 symptom testimony, the opinions of nurse practitioners Dana Tell and Betty Bennett, and a
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1 statement from vocational analyst Daniel McKinney. AR 858, 861, 863-65. In so doing, ALJ
2 Adams reasoned that this case was before the Social Security Administration on a stipulated
3 remand from this Court to reconsider the VA's disability determination and to evaluate the
4 results of Dr. Rezvani's examination. AR 855.

5 ALJ Adams erred in adopting these findings on the grounds that this Court affirmed ALJ
6 Dethloff's earlier decision, given that ALJ Dethloff's decision was subsequently vacated
7 following the Ninth Circuit's remand order. *See* AR 975. ALJ Adams erred in finding that this
8 case involves a stipulated remand by the parties, rather an order from the Ninth Circuit.

9 However, given that the Ninth Circuit only found error as to ALJ Dethloff's evaluation of
10 the VA's disability determination and Dr. Rezvani's examination, the Court could only conclude
11 that ALJ Adams erred in adopting ALJ Dethloff's other findings if there was new evidence that
12 could impact ALJ Adams' evaluation of the record. *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th
13 Cir. 2012) (noting that harmless error principles apply in the Social Security context).

14 The record does contain new evidence not available to ALJ Dethloff prior to the initial
15 2012 hearing decision. However, all this evidence is from a period long after Plaintiff's date last
16 insured, and cannot establish that Plaintiff was disabled during the period at issue. AR 1072-
17 1337.

18 As such, the law of the case doctrine applies, and the Court will only consider ALJ
19 Adams' evaluation of Dr. Rezvani's examination and the VA's disability determination.

20 **II. Whether the ALJ properly evaluated the results of Dr. Rezvani's**
21 **examination.**

22 In its remand order, the Ninth Circuit found that ALJ Dethloff erred by not considering
23 the results of an examination conducted by Dr. Rezvani. AR 942.
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1 Dr. Rezvani examined Plaintiff in January 2003. AR 553-55. Dr. Rezvani's physical
2 examination revealed that Plaintiff had normal posture, but walked with a right sided limp. AR
3 553. Dr. Rezvani's examination also revealed radiation pain on movement, a positive straight leg
4 raising test, and evidence of radiculopathy. AR 554. Dr. Rezvani stated that Plaintiff exhibited
5 pain, weakness, incoordination, and a lack of endurance affecting range of motion in Plaintiff's
6 lumbar spine. *Id.* Dr. Rezvani also summarized the results of an x-ray of Plaintiff's lumbar spine,
7 observing that Plaintiff had variable mild to moderate degenerative disc disease, spondylosis, and
8 facet arthropathy. *Id.*

9 The Ninth Circuit noted that Plaintiff walked with a limp and that Dr. Rezvani observed,
10 in analyzing x-rays of Plaintiff's lumbar spine, that Plaintiff had mild to moderate degenerative
11 disc disease. AR 553-54, 942. The Ninth Circuit contrasted this with the October 2002
12 assessment of Marc Suffis, M.D., who examined a June 2001 MRI of Plaintiff's lumbar spine
13 and concluded that Plaintiff had only minimal degenerative disc disease at L1 and L2 with mild
14 degenerative changes on the bilateral facet joints. AR 567, 942. The Ninth Circuit found that if
15 ALJ Dethloff had considered Dr. Rezvani's findings, the ALJ might have come to a different
16 conclusion concerning the limiting effects of Plaintiff's back impairment. AR 942, citing *Marsh*
17 *v. Colvin*, 792 F.3d 1170, 1172-73 (9th Cir. 2015) (noting that an ALJ errs by ignoring a treating
18 physician's treatment notes).

19 ALJ Adams assigned "little weight" to Dr. Rezvani's opinion, reasoning that: (1) Dr.
20 Rezvani did not offer an opinion regarding Plaintiff's functional limitations, and it is
21 questionable if Dr. Rezvani's evaluation constitutes a "medical opinion" under Social Security
22 regulations; (2) Dr. Rezvani's observation that Plaintiff had a limp is inconsistent with the results
23 of Plaintiff's lumbar MRI, which demonstrated no disc herniations or nerve root impingement;
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1 (3) Plaintiff's limping is inconsistent with a physical examination conducted several months
2 earlier, during which Plaintiff demonstrated a grossly intact gait; (4) Dr. Rezvani did not have
3 the opportunity to review x-rays from 2006, which showed only mild degenerative changes in
4 Plaintiff's lumbar spine; (5) Dr. Rezvani did not have the chance to examine Plaintiff's
5 subsequent exercise stress test; (6) following Dr. Rezvani's evaluation, another physician gave
6 Plaintiff medical approval to work as a dump truck driver; (7) based partly on Dr. Rezvani's
7 evaluation, the VA assigned Plaintiff a 20 percent disability rating for his lumbar spine, which
8 suggests only a "slight/mild" impairment; (8) Dr. Rezvani relied partly on Plaintiff's subjective
9 allegations, which are not fully reliable; and (9) even if Plaintiff's limping during Dr. Rezvani's
10 evaluation were representative of his general functioning, it would not render Plaintiff disabled
11 since there are other sedentary jobs with an at will sit/stand option Plaintiff could perform at step
12 five. AR 862-63.

13 With respect to ALJ Adams' first reason for discounting Dr. Rezvani's opinion, Social
14 Security regulations define medical opinions as "statements from acceptable medical sources that
15 reflect judgments about the nature and severity of your impairment(s), including your symptoms,
16 diagnosis and prognosis, what you can still do despite impairment(s), and your physical or
17 mental restrictions." *See* 20 C.F.R. § 404.1527(a)(1).

18 The results of Dr. Rezvani's examination constitute significant, probative evidence that
19 the ALJ was obliged to consider in reaching a disability determination. *See Flores v. Shalala*, 49
20 F.3d 562, 570-71 (9th Cir. 1995) (noting that an ALJ "may not reject 'significant probative
21 evidence' without explanation.") (internal citations omitted). However, Dr. Rezvani did not offer
22 an opinion concerning Plaintiff's functional limitations. Plaintiff concedes that Dr. Rezvani's
23 evaluation does not contain an assessment of Plaintiff's work-related limitations, but contends
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1 that it is the duty of the ALJ, not of examining physicians, to determine a claimant's ability to
2 work. Dkt. 12, p. 6.

3 That the ALJ is responsible for determining Plaintiff's RFC is not in dispute. *See* 20
4 C.F.R. § 404.1527 ("Although we consider opinions from medical sources on issues such as . . .
5 your residual functional capacity . . . , the final responsibility for deciding [this issue] is reserved
6 to the Commissioner."). However, given that Dr. Rezvani did not provide an assessment of
7 Plaintiff's functional limitations, it is questionable whether the results of his examination qualify
8 as a "medical opinion" under Social Security regulations. Even if Dr. Rezvani's evaluation did
9 qualify as a medical opinion, the fact that it does not contain an assessment of Plaintiff's
10 functional limitations makes it far less useful to the ALJ in reaching a disability determination.

11 Thus, the Court cannot say that ALJ Adams erred in assigning little weight to Dr.
12 Rezvani's evaluation on this basis.

13 ALJ Adams has offered additional specific, legitimate reasons for assigning little weight
14 to the results of Dr. Rezvani's evaluation. However, even if the ALJ erred in citing these reasons,
15 any error would be harmless since the ALJ has offered a specific, legitimate reason for
16 discounting Dr. Rezvani's evaluation. *See Presley-Carrillo v. Berryhill*, 692 Fed. Appx. 941,
17 944-45 (9th Cir. 2017) (citing *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162
18 (9th Cir. 2008)) (although an ALJ erred on one reason he gave to discount a medical opinion,
19 "this error was harmless because the ALJ gave a reason supported by the record" to discount the
20 opinion).

21 **III. Whether the ALJ properly evaluated a disability rating from the Veteran's**
22 **Administration.**

23 Plaintiff maintains that ALJ Adams improperly evaluated a disability rating decision
24 from the VA. Dkt. 12, pp. 12-13.

1 Social Security regulations provide that decisions by other governmental agencies such as
2 the VA concerning disability are not binding on the Social Security Administration. 20 C.F.R.
3 § 404.1504. Nevertheless, the Ninth Circuit has held that an ALJ must ordinarily give great
4 weight to a VA determination of disability given the “marked similarity between these two
5 federal programs.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (internal
6 citations omitted) (noting various similarities between the programs); *see also Berry v. Astrue*,
7 622 F.3d 1228, 1236 (9th Cir. 2010); *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685,
8 694-95 (9th Cir. 2009). However, “[b]ecause the VA and SSA criteria for determining disability
9 are not identical,” the ALJ “may give less weight to a VA disability rating if he gives persuasive,
10 specific, valid reasons for doing so that are supported by the record.” *McCartey*, 298 F.3d at
11 1076 (citing *Chambliss v. Massanari*, 269 F.3d 520, 522 (5th Cir. 2001)).

12 On February 21, 2003, the VA assigned Plaintiff a 20 percent disability rating due his
13 lumbar degenerative disc disease. AR 840, 842. The VA also found that Plaintiff had a variety of
14 other service-connected musculoskeletal impairments, and assigned Plaintiff a 10 percent
15 disability rating for each of these impairments, along with a 10 percent rating for asthmatic
16 bronchitis. AR 841, 843-45. The VA later assigned Plaintiff a 10 percent disability rating for his
17 tinnitus, giving Plaintiff an overall disability rating of 70 percent. AR 831, 833-34. The VA
18 found that effective February 2, 2004, Plaintiff was entitled to a finding of individual
19 unemployability because he was unable to secure or follow a substantially gainful occupation
20 due to his service-connected disabilities. AR 834-35.

21 In a letter dated July 27, 2010, the VA stated that Plaintiff had service-connected
22 disabilities evaluated at 70 percent, and was being awarded benefits at the 100 percent rate. AR
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1 140. In a letter dated September 13, 2010, the VA stated that Plaintiff had a service-connected
2 disability rating of 100 percent since February 1, 2004. AR 184.

3 In the 2012 hearing decision, ALJ Dethloff assigned “little weight” to the VA’s rating
4 decision, reasoning that: (1) the VA disability rating provided little insight into Plaintiff’s ability
5 to perform work related activities for purposes of determining disability under Social Security
6 regulations; (2) the VA disability determination was partly based on impairments that Plaintiff
7 did not mention during the hearing; and (3) the VA increased Plaintiff’s disability rating to 100
8 percent without providing a rationale for the increase. AR 29-30.

9 The Ninth Circuit found that ALJ Dethloff did not provide persuasive, specific, valid
10 reasons for discounting the VA disability rating. AR 941.

11 In the 2019 hearing decision, ALJ Adams again rejected the VA’s disability rating,
12 reasoning that: (1) the VA only assigned Plaintiff a 20 percent disability rating based on his
13 lumbar spine impairment; (2) the VA’s 100 percent disability rating relied on a combination of
14 impairments, some of which the ALJ found non-severe at step two of the sequential evaluation;
15 and (3) the VA and the Social Security Administration have different rules and regulations for
16 determining disability. AR 863.

17 With respect to the ALJ’s first and second reasons, Defendant cites case law suggesting
18 that a 30 percent VA disability rating is consistent with a finding of non-disability under Social
19 Security regulations. Dkt. 13, p. 5; citing *Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1225
20 (9th Cir. 2010).

21 However, in this case, the VA assigned Plaintiff a 70 percent service-connected disability
22 rating, which was subsequently increased to 100 percent as of February 1, 2004. AR 140, 184.
23 The fact that this rating was based on a combination of impairments, some of which the ALJ
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1 subsequently found non-severe, cannot serve as a persuasive, specific, valid reason for
2 discounting the VA disability rating. First, Defendant concedes that this was not a sufficient
3 reason for rejecting the VA's disability rating. Dkt. 13, p. 9.

4 Second, the Court notes that the VA's disability rating, which was based on a finding that
5 Plaintiff had a 10 percent, or in some cases zero percent, disability rating based on a series of
6 impairments, is not inconsistent with the ALJ's finding that many of these impairments were
7 "non-severe" as that term is defined by Social Security regulations. *See* AR 837-39, 857-58; *see*
8 *also* 20 C.F.R. § 404.1520(c) (An impairment is not considered to be "severe" if it does not
9 "significantly limit" a claimant's mental or physical abilities to do basic work activities).

10 As such, the only significant difference between the ALJ's findings and those of the VA
11 is that the VA found Plaintiff disabled while the ALJ did not. While this can be explained in part
12 by the difference between SSA and VA regulations, given that the Ninth Circuit has noted the
13 "marked similarity" between the two programs, the difference between them cannot, by itself,
14 constitute a persuasive, specific, valid reason for rejecting a 100 percent disability rating from
15 the VA. *See McCartey*, 298 F.3d at 1076.

16 As for the ALJ's third reason, the Ninth Circuit found that ALJ Dethloff erred in citing
17 the difference between VA and Social Security regulations as a reason for discounting the VA's
18 disability rating. AR 941; citing *Berry v. Astrue*, 622 F.3d 1228, 1246 (9th Cir. 2010). ALJ
19 Adams also erred by citing this as reason for discounting the VA rating.

20 Accordingly, the ALJ has not provided persuasive, specific, valid reasons for discounting
21 the VA's 100 percent disability rating.

1 **IV. Remedy.**

2 Plaintiff argues that the ALJ erred and that this case should be remanded for an award of
3 benefits. Dkt. 12, pp. 18-19. The Court may remand a case “either for additional evidence and
4 findings or to award benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1992). Generally,
5 when the Court reverses an ALJ’s decision, “the proper course, except in rare circumstances, is
6 to remand to the agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379
7 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit created a “test for
8 determining when evidence should be credited and an immediate award of benefits directed[.]”
9 *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded
10 where:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
12 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
13 before a determination of disability can be made, and (3) it is clear from the record
that the ALJ would be required to find the claimant disabled were such evidence
credited.

14 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

15 In its 2017 order, the Ninth Circuit found that even crediting as true the results of Dr.
16 Rezvani’s examination and the VA’s disability rating, the ALJ would still not be required to find
17 Plaintiff disabled. AR 942-43.

18 Even if Ninth Circuit’s requirements for awarding benefits were met, the Court retains
19 “flexibility” in determining the appropriate remedy. *Garrison v. Colvin*, 759 F.3d 995, 1021 (9th
20 Cir.2014). The court may remand for further proceedings “when the record as a whole creates
21 serious doubt as to whether the claimant is, in fact, disabled within the meaning of the Social
22 Security Act.” *Id.* The Court considered the length of time Plaintiff has been waiting for a final
23 disposition. *See Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Plaintiff filed his
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1 application for disability insurance benefits in in 2010 and has been waiting nearly 10 years for a
2 final decision on his claim. AR 124-30.

3 The Court cannot say that the ALJ would be required to find Plaintiff disabled if the
4 VA's disability rating were credited as true. Nor can the Court find that a finding of disability is
5 supported by substantial evidence based on the existing record. Accordingly, remand for further
6 administrative proceedings is the appropriate remedy.

7 CONCLUSION

8 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded
9 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and
10 this matter is remanded for further administrative proceedings in accordance with the findings
11 contained herein.

12 Dated this 24th day of January, 2020.

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15 David W. Christel
16 United States Magistrate Judge
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